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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOEL WACHS, JOY PICUS, JOHN FERRARO, ZEV YAROSLAVSKY, RUTH GALANTER, ERNANI BERNARDI, MARVIN BRAUDE, HAL BERNSON, MICHAEL WOO, JOAN FLORES,

Petitioners,

vs.

JOHANNA TREVINO, a Minor, by and through her next friend, her Grandmother, Filadelfia Cruz,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Are local legislators, such as Los Angeles City Councilmembers, entitled to absolute legislative immunity in an action against them for damages arising from their legislative acts?

2. If so, is the act of voting to pay a damages judgment which includes punitive damages assessed against public employees acting under color of state law a legislative act for which local legislators should be absolutely immune?

PARTIES IN THE ACTION

Johanna Trevino, a minor, by and through her next friend, her grandmother, Filadelfia Cruz, was the plaintiff-appellee in the court below. Present and former Los Angeles City Council members Joel Wachs, Joy Picus, John Ferraro, Zev Yaroslavsky, Ruth Galanter, Ernani Bernardi, Marvin Braude, Hal Bernson, Michael Woo and Joan Flores were defendants-appellants in the court below.

Additional defendants named in the complaint but not petitioners herein are Daryl Gates, Tom Bradley, Tom Reddin, Roger Murdock, Ed Davis, Herbert Boeckmann, James Fisk, Stephen Gavin, Maxwell Greenberg, Elbert Hudson, Marguerite Justice, Emmett McGaughey, Salvador Montenegro, Barbara Schlei, Robert Talcott, Reva Tooley, Robert Weil, Samuel Williams, Stephen Yslas, LAPD Officers Jerry Brooks, Joseph Callian, Warren Eggar, David Harrison, John Helms, Michael Sirk, Richard Spellman, Gary Strickland, James Tippings, Richard Zierenberg, Manuel Fruge, Joseph Freia, E.T. Guiza, Peter Sanchez, Reginald Weaver, James Toma, C.S. Winston, Philip Wixon, Gary Zerbey, and 100 Unknown Employees or Officials of the City of Los Angeles in their individual and official capacities, and the City of Los Angeles.

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JOEL WACHS, JOY PICUS, JOHN FERRARO, ZEV YAROSLAVSKY, RUTH GALANTER, ERNANI BERNARDI, MARVIN BRAUDE, HAL BERNSON, MICHAEL WOO, JOAN FLORES,

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JOHANNA TREVINO, a Minor, by and through her next friend, her Grandmother, Filadelfia Cruz,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, Joel Wachs, Joy Picus, John Ferraro, Zev Yaroslavsky, Ruth Galanter, Ernani

Bernardi, Marvin Braude, Hal Bernson, Michael Woo and Joan Flores respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this case on May 31, 1994.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, denying petitioner's motion to dismiss present and former members of the Los Angeles City Council from the lawsuit and ruling that a vote to pay a damages judgment (including punitive damages assessed against public employees acting under color of state law) in a civil lawsuit is not a legislative act for which the council members are absolutely immune, was originally filed February 28, 1994 and was reported at ***Trevino v. Gates***, 17 F.3d 1189 (9th Cir. 1994). This opinion was withdrawn and a second opinion filed May 31, 1994 and reported at ***Trevino v. Gates***, 23 F.3d 1480 (9th Cir. 1994), and attached hereto in Appendix A. This opinion affirmed the district court's order denying absolute immunity reported at ***Trevino v. Gates,*** 789 F.Supp. 621 (C.D. Cal. 1992), and attached hereto in Appendix B.

JURISDICTION

Petitioners were appellants in this case in the United States Court of Appeals for the Ninth Circuit. The first opinion and judgment was entered on February 28, 1994. No petition for rehearing was filed in the Court of Appeals. The first opinion was withdrawn and a second opinion filed on May 31, 1994. This petition is timely filed within 90 days of the date judgment was entered. ***28 U.S.C. §2101(c), Rule 13-1,*** Rules of the U.S. Supreme Court. The jurisdiction of this Court is invoked pursuant to ***28 U.S.C. §1254.***

STATUTES INVOLVED

California Government Code §825

(a) If an employee or former employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the public entity and such request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based

thereon or any compromise or settlement of the claim or action to which the public entity has agreed.

If the public entity conducts the defense of an employee or former employee against any claim or action with his reasonable good-faith cooperation, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed; but where the public entity conducted such defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his employment as an employee of the public entity, the public entity is required to pay the judgment, compromise or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his employment as an employee of the public entity.

Nothing in this section authorizes a public entity to pay that part of a claim or judgment that is for punitive or exemplary damages.

(b) Notwithstanding subdivision (a) or any other provision of law, a public entity, other than the state as defined in Section 900.6, is authorized to pay

that part of a judgment that is for punitive or exemplary damages if the governing body of that public entity, acting in its sole discretion, finds all of the following:

(1) The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity.

(2) At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity.

(3) Payment of the claim or judgment would be in the best interests of the public entity.

The discovery of asserts of a public entity and the introduction of evidence of the assets of a public entity shall not be permitted in an action in which it is alleged that a public employee is liable for punitive or exemplary damages.

The possibility that a public entity may pay that part of a judgment that is for punitive damages shall not be disclosed in any trial in which it is alleged that a public employee is liable for punitive or exemplary damages, and that disclosure shall be grounds for a mistrial.

(c) Except as provided in subdivision (d), if the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10 (commencing with Section 3500) of Division 4 of Title 1, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

(d) The subject of payment of punitive damages pursuant to this section or any other provision of law shall not be a subject of meet and confer under the provisions of Chapter 10 (commencing with Section 3500) of Division 4 of Title 1, or pursuant to any other law or authority.

(e) Nothing in this section shall affect the provisions of Section 818 prohibiting the award of punitive damages against a public entity. This section shall not be construed as a waiver of a public entity's immunity from liability for punitive damages under Section 1981, 1983, or 1985 of Title 42 of the United States Code.

STATEMENT OF THE CASE

Respondent Johanna Trevino was two and one-half years old at the time this action was commenced and brought through "her next friend, her grandmother," Filadelfia Cruz. In a complaint filed April 1, 1992, respondent alleged that, seven days before she was born, her father was one of four men who participated in a "commercial burglary" at a McDonald's restaurant in Sunland, California, and that he was shot and killed by Los Angeles Police Officers. Respondent alleged that the actions of the defendants under color of state law deprived her of rights secured by the United States Constitution and were actionable pursuant to ***42 U.S.C. §1983***. Jurisdiction of the district court was invoked pursuant to ***28 U.S.C. §§1331 and 1343.***

Respondent's grandmother had previously sued the City of Los Angeles on account of the death of her son, Javier Trevino (respondent's father) and that litigation was concluded adversely to the City in ***Gomez v. Gates,*** CV 90-0859 JSL, U.S. District Court for the Central District of California. Although no compensatory damages were awarded in that action, nominal damages in the amount of $1.00 and punitive damages against the Chief of Police and eight officers, totalling approximately $44,000, were

assessed. The City and more than thirty municipal defendants, including members of the City Council, had been dismissed or dropped from the case either prior to or during trial.

This action was filed a few days after the verdict in ***Gomez***. Counsel for respondent, who had previously represented the plaintiffs in ***Gomez***, addressed a letter to members of the Los Angeles City Council informing them that ten Council members had previously been named in the ***Gomez*** case because they had voted to indemnify the Chief of Police for punitive damages assessed in yet another civil rights case [***Larez v. City of Los Angeles,*** 946 F.2d 630 (9th Cir. 1991)]. Counsel for respondent advised council members to "think twice" before making the same mistake, and promised to dismiss council members voting *not* to indemnify Chief Gates in ***Gomez*** from the newly filed ***Trevino*** action (the case at bar). Notwithstanding this "advice," a majority of members of the City Council voted to satisfy the ***Gomez*** judgment, including punitive damages assessed against Chief Gates, after making the findings required by ***California Government Code Section 825(b)***. This lawsuit was thereafter served on defendants and depositions of City Council members noticed.

The complaint in this matter alleged that members of the City Council, who were named in the complaint in both their individual and official capacities, had violated respondent's constitutional rights by ratifying, acquiescing in, or affirming the misconduct which enabled the death of respondent's father. Respondent asserted that the City's policy makers had knowingly, or with gross negligence or deliberate indifference, created, maintained, ratified or failed to correct an official policy permitting the occurrence of the types of wrongs complained of.

On June 8, 1992, petitioners moved the district court for a stay of discovery pending litigation of the issue of immunity. No opposition to the motion was filed and an indefinite stay was imposed. On July 31, 1992, all parties stipulated that a motion to dismiss on the ground of legislative immunity filed pursuant to ***Rule 12(b),*** Federal Rules of Civil Procedure, in another case [(***Gillen v. Gates,*** CV 91-6384 JSL (U.S. District Court for the Central District of California)], could be deemed to have been filed in the case at bar.

On August 10, 1992, in a published order and opinion (***Trevino v. Gates, supra at*** 798 F.Supp. 621), the court ruled that absolute legislative immunity does not protect the council members from

suit. Petitioners appealed this decision to the United States Court of Appeals for the Ninth Circuit. The first opinion in this matter was filed February 28, 1994 but was later withdrawn. In a second opinion filed May 31, 1994, a panel of that Court affirmed the trial court's order, ruling that the

> ". . . determinations made by city council members whether to pay punitive damage awards pursuant to section 825(b) are of limited application and are non-legislative in nature. These decisions are made on a case-by-case basis. Based on the record before us, we cannot say they involve the formulation of policy. Nor do they apply to the community at large. Rather, they are directed toward shielding individuals from specific damage awards. (Citations omitted.)" (Appendix, A-7.)

Petitioners' argument that the council members had acted in their legislative capacity, and in the interest of the community as a whole, in voting to pay a judgment, including punitive damages, against public employees acting in the course and scope of their employment, was rejected. (Appendix, A-8.)

ARGUMENT

I.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

A petition for writ of certiorari will be granted when there are special and important reasons therefor. (***Rule 10,*** Rules of the U.S. Supreme Court.) A grant of certiorari is justified in the instant case because the Ninth Circuit has decided an important question of federal law which has not been, but which should be, settled by this Court. Although the majority of federal circuits now extend legislative immunity to local legislatures such as municipal city councils, this Court has yet to rule on the issue that it left undecided in ***Lake Country Estates, Inc. v. Tahoe Reg. Plan.,*** 440 U.S. 391, 404 fn. 26, 99 S.Ct. 1171, 1178-1179 fn. 26, 59 L.Ed.2d 401 (1979).

Additionally, the question of whether local city council members are absolutely immune under the doctrine of legislative immunity for voting to pay a judgment, which includes punitive damages assessed against public employees found liable for acts or omissions under color of state law, is one which has not been, but should be, resolved by this Court.

Pursuant to the Ninth Circuit's ruling, local city council members face the prospect of being named in their personal capacity in every new civil rights law suit filed in their jurisdiction, having to defend the litigation and respond to discovery requests that reduce the time available to fulfill their obligations to the public, and being exposed to personal liability for damages, simply because they voted to pay a judgment which included punitive damages assessed against public employees. The applicability of the doctrine of legislative immunity in these circumstances is a question of federal law with such wide-ranging ramifications and consequences that the question should be resolved by this Court rather than by the circuits on a piece-meal basis, and certiorari is appropriate for that reason.

II.

THE DOCTRINE OF LEGISLATIVE IMMUNITY SHOULD BE EXTENDED TO LOCAL LEGISLATORS SUCH AS CITY COUNCIL MEMBERS.

In ***Tenney v. Brandhove,*** 341 U.S. 367, 95 L.Ed.2d 1019 (1951), this Court ruled that the doctrine of absolute legislative immunity protected state legislators from suits for damages brought pursuant to ***42 U.S.C. §1983*** based on their acts or omissions in legislative proceedings. ***Id. at*** 341 U.S. 369-371, 95 L.Ed.2d 1023-1025. The reasoning which supported the rule was found to be equally applicable to regional lawmakers in ***Lake Country Estates, Inc. v. Tahoe Reg. Plan., supra at*** 440 U.S. 405, 99 S.Ct. 1179. The question of whether individuals performing legislative functions at a purely local level should be afforded absolute immunity was not addressed by the Court in ***Lake Country Estates***, however (***Id. at*** 440 U.S. 404 fn. 26, 99 S.Ct. 1178-1179 fn. 26), and, so far as petitioners can discover, has yet to be determined by this Court.

In the absence of a definitive ruling from this Court, the majority of federal circuits considering the

question have extended absolute legislative immunity to local lawmakers, such as city council members. The following courts have ruled that local legislators are immune for personal liability in civil rights lawsuits for damages allegedly caused by their acts or omissions in a legislative capacity:

Acevedo-Cordero v. Cordero-Santiago, 958 F.2d 20, 21 (1st Cir. 1992);

Goldberg v. Town of Rocky Hill, 973 F.2d 70, 72 (2nd Cir. 1992);

Aitchison v. Raffiani, 708 F.2d 96, 98-100 (3rd Cir. 1983);

Bruce v. Riddle, 631 F.2d 272, 277 (4th Cir. 1980);

Hernandez v. City of Lafayette, 643 F.2d 1188, 1193 (5th Cir. 1981);

Haskell v. Washington Township, 864 F.2d 1266, 1277 (6th Cir. 1988);

Reed v. Village of Shorewood, 704 F.2d 943, 952 (7th Cir. 1983);

Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 611-614 (8th Cir. 1980);

Kuzinich v. County of Santa Clara, 689 F.2d 1345, 1349 (9th Cir. 1982);

Espanola Way Corp. v. Meyerson, 690 F.2d 827, 829 (11th Cir. 1982).

Given this consensus of opinion, certiorari is appropriate in this matter to formally extend absolute legislative immunity to local legislators and to resolve any question concerning the applicability of the immunity in light of this Court's silence on the question.

III.

CERTIORARI IS WARRANTED TO CONSIDER THE QUESTION OF WHETHER A CITY COUNCIL MEMBER'S VOTE TO PAY A JUDGMENT INCLUDING PUNITIVE DAMAGES IS A LEGISLATIVE ACT FOR WHICH THE LEGISLATOR SHOULD BE ABSOLUTELY IMMUNE FROM LIABILITY.

This Court has long recognized "the privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings." ***Tenney v. Brandhove, supra at*** 341 U.S. 372, 95 L.Ed.2d 1025.

> "The purpose of this immunity is to insure that the legislative function may be performed independently without fear of

outside interference. *(Ibid.)* To preserve legislative independence, we have concluded that 'legislators engaged "in the sphere of legitimate legislative activity," (citation omitted) should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.' (Citation omitted.)" ***Supreme Court of Virginia v. Consumers Union, Etc.,*** 446 U.S. 719, 730-731, 100 S.Ct. 1967, 1974, 64 L.Ed.2d 641 (1980).

The benefits of legislative immunity are afforded to legislators sued in their personal capacity not for the sake of the individuals involved, but instead "for the public good." ***Tenney v. Brandhove, supra at*** 341 U.S. 377, 95 L.Ed.2d 1027.

This Court has consistently followed a "functional approach" to questions of immunity. Thus, absolute legislative immunity is available only for legislators actually performing legislative acts rather than when acting in an administrative or executive capacity. ***Harlow v. Fitzgerald,*** 457 U.S. 800, 810-811, 102 S.Ct. 2727, 2734, 73 L.Ed.2d 396 (1982). This functional approach involves a three-step analysis. The Court first looks to see

whether the asserted immunity enjoys an historical or common-law basis, as does legislative immunity. ***Mitchell v. Forsyth,*** 472 U.S. 511, 522, 105 S.Ct. 2806, 2813, 86 L.Ed.2d 411 (1985). Next examined is the question of whether the official asserting the immunity faces "obvious risks of entanglement in vexatious litigation" where the "mere threat of litigation may significantly affect the fearless and independent performance of duty" by the official. ***Ibid.*** Finally, the court asks whether the official asserting absolute immunity is subject to "other checks that help to prevent abuses of authority from going unredressed." ***Ibid.***

All of the considerations outlined by the Court's "functional approach" analysis discussed in ***Mitchell v. Forsyth*** would support a rule affording legislators immunity for voting to pay a judgment that includes punitive damages where such payment is not required, but is authorized by state law at the sole discretion of local lawmakers. The Court has long recognized the historical basis of legislative immunity, the threat of personal liability (which was made very real in this case by respondent's counsel's letter to the council members delivered prior to service of the lawsuit) may indeed affect the members' ability to vote in a manner consistent with

the best interests (including economic interests) of their constituents, and the council members are accountable both to the public in the electoral process and to injured plaintiffs if their actions create policies that injure individuals. ***Lake Country Estates, Inc. v. Tahoe Reg. Plan, supra at*** 440 U.S. 405 fn.29, 99 S.Ct. 1179 fn. 29.

The principle hurdle to extending immunity to petitioners in this case, then, is the question of whether the activity in which they engaged constituted a legislative act. Both the district court and the Ninth Circuit have concluded that voting to pay a damages judgment, and engaging in statutory fact-finding prefatory to payment of a punitive damages portion of that judgment, are administrative rather than legislative acts. The cases and the analysis relied upon by the courts below, however, replaced the important policy questions articulated by this Court on numerous occasions with inflexible rules developed in the specific factual context of litigation wholly unrelated to the acts alleged to have caused respondent's injury in this matter. Certiorari is appropriate to settle what is ultimately an important question of federal law concerning the reach of legislative immunity when lawmakers engage in discretionary decision making by voting

not on general ordinances or laws but instead on matters which can be said to constitute the public's business, including disposition of specific civil rights litigation, which daily comes before them.

Many of the cases considering the question of whether particular acts are legislative for purposes of extending the immunity have relied upon this Court's discussion of the "essentials of the legislative function" in ***Yakus v. United States,*** 321 U.S. 414, 88 L.Ed.2d 834 (1943). Considering the question of whether a law creating a price control agency involved an unconstitutional delegation of legislative power by the U.S. Congress, the Court concluded that legislative function involves ". . .the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct." ***Id. at*** 321 U.S. 424, 88 L.Ed.2d 848. The Court then determined that Congress had not improperly delegated its lawmaking authority to the administrative agency in question since Congress had described the legislative objective, the method to be used to achieve the objective, and the standards to be used by the administrators charged with enforcing the law. ***Ibid.***

This broad definition of legislative function has been used by a number of courts to deny legislative

immunity to the actions of lawmakers which do not determine broad policies or make rules binding on the public in general. (See, e.g., ***Cinevision Corp. v. City of Burbank,*** 745 F.2d 560, 580 (9th Cir. 1984); ***Zamsky v. Hansell,*** 933 F.2d 677, 679 (9th Cir. 1991); ***Cutting v. Mussey,*** 724 F.2d 259, 261 (1st Cir. 1984); ***Bateson v. Geisse***, 857 F.2d 1300, 1304 (9th Cir. 1988); ***Hughes v. Tarrant County Tex.,*** 948 F.2d 918, 921 (5th Cir. 1991). Cases such as these have denied immunity where the conduct complained of did not establish a general policy applicable to the entire community.

Requiring legislative action to be general in concept and to have some universal applicability to the public at large in order for the immunity to be applied unduly excludes from protection a whole range of activity which is either traditionally legislative or supportive of such action. A more productive approach might be to focus on whether the legislator is engaging in discretionary decision making in his or her official capacity which can create actionable policies for the public entity. If the activity in question can be described in these terms, it would seem to be unimportant whether the end product of the decision making is a law of universal application or a decision which is specific to the

particular matter or individuals being considered. Consistent with this view, many courts have ignored the "line drawing" aspects of the decision in ***Yakus*** and, when asked to apply the doctrine of legislative immunity, have focused instead on the discretionary policy making aspects of the legislator's decisions and the general policy considerations supporting the immunity.

In ***Brown v. Crawford County, Ga.,*** 960 F.2d 1002 (11th Cir. 1992), for example, the court recognized that "'voting, debate and reacting to public opinion are manifestly in furtherance of legislative duties.' (Citation omitted.)" ***Id. at*** 1011. The court thus found that the lawmakers' vote to impose a moratorium on a particular subdivision development was a legislative function, even though the measure was alleged to have been enacted to stop one particular plaintiff's subdivision plans. ***Id. at*** 960 F.2d 1004-1005. The fact that the decision was in reality directed at one individual was not considered as significant as the fact that the lawmakers engaged in discretionary policy making in passing the ordinance.

In ***Minton v. St. Bernard Parish School Bd.,*** 803 F.2d 129 (5th Cir. 1986), the court recognized that legislative immunity did not provide blanket

protection from litigation, but only protected officials fulfilling a legislative function. ***Id. at*** 135. The court opined that the dividing point between protected and unprotected conduct could be observed when the legislator engages in activities unconnected with the legislative process. ***Ibid.*** The case was remanded to the trial court for a determination of whether, under the state statutory scheme, the legislators' decisions whether or not to appropriate funds to pay a tort judgment "...involve the degree of discretion and public-policy-making traditionally associated with legislative functions or merely an administrative application of existing policies." ***Ibid.***

In ***Rateree v. Rockett,*** 852 F.2d 946 (7th Cir. 1988), plaintiffs sued three City Commissioners and other elected officials after they were fired, allegedly for political reasons. ***Id. at*** 947. The decision made by the Commissioners was a budgetary one to eliminate certain jobs, allegedly with the intent to terminate the plaintiffs. While the court opined that decisions concerning employment were generally administrative rather than legislative, budgetary decisions were regarded as "uniquely legislative," and plaintiff should not be permitted to transform a protected legislative decision into an unprotected administrative one by characterizing the decision as

one affecting only employment issues. ***Id. at*** 950. Thus, the decision to eliminate certain jobs was deemed to be protected by legislative immunity because it involved legislative, public policy choices. ***Id. at*** 950-951.

When a local legislator in California considers the question of whether or not to pay punitive damages assessed against a public employee found to have acted under color of state law, he or she is guided by the policy considerations established by the state Legislature in ***Government Code § 825(b).*** Acting on behalf of the public entity, the legislators have been granted authority and sole discretion to pay exemplary damages against an employee if they make certain findings: that the public employee was acting in the course and scope of employment; that the employee acted in good faith, without actual malice and in the apparent best interests of the public entity; and that payment of the judgment would be in the best interests of the public entity. ***Cal.Gov.Code §825(b)(1)-(3).***

The fact that a jury has assessed punitive damages against the employee is not dispositive on the issue of whether the employee acted in good faith and without malice since the legislators are not bound by the jury's findings when making the

decision to pay the judgment. ***Cornwell v. City of Riverside***, 896 F.2d 398, 399 (9th Cir. 1990). That the findings required by the statute are specific to one particular case and to one public employee similarly does not convert the discretionary decision making required by the statute to an administrative act unprotected by the legislative immunity. Just as the state legislature in ***Supreme Court of Virginia v. Consumers Union, Etc., supra,*** delegated its entire legislative power respecting the regulation of the Bar in that state to the Virginia Supreme Court (***Id. at*** 100 S.Ct. 1976), so too did the state legislature in California delegate to the various public entities operating within the state the legislative power to exercise discretion in paying punitive damage awards. ***Cornwell v. City of Riverside, supra at*** 896 F.2d 400.

A legislator considering whether a public employee's punitive damages should be paid in a particular case is engaging in discretionary policy making just as is the legislator considering whether to enact a zoning ordinance. The fact that the scale involved is smaller or is seemingly limited to the impact on a single individual should not convert this discretionary exercise of legislative authority conferred by the state into administrative or

ministerial conduct. If a legislator's discretionary decisions can be said to be making policy on behalf of a public entity (the very essence of the allegations in the complaint in the instant case), there is simply no reason to exclude those policy making decisions from the protection of legislative immunity. Indeed, some courts already recognize the policy making aspects of voting to pay punitive damages awards and have determined that personal liability for legislators voting on such a measure is inappropriate if only for the reason that the policy itself is actionable under ***Monell v. New York City Department of Social Services,*** 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). ***Trotter v. City of Chicago,*** 573 F.Supp. 1269, 1272 (N.D. Ill. 1983), ***Brown v. City of Chicago,*** 573 F.Supp. 1375, 1377-1378 (N.D. Ill. 1983), ***Lake Country Estates, Inc. v. Tahoe Reg. Plan., supra at*** 440 U.S. 405 fn.29, 99 S.Ct. 1179 fn.29.)

This Court has recognized the harm which can be caused by civil lawsuits which seek to hold legislators personally responsible in damages for acts committed as part of their legislative responsibilities.

> "In many contexts, government officials are expected to make decisions that are impartial

> or imaginative, and that above all are informed by considerations other than the personal interests of the decisionmaker. Because government officials are engaged by definition in governing, their decisions will often have adverse effects on other persons. When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it." ***Forrester v. White,*** 484 U.S. 219, 223, 108 S.Ct. 538, 542, 98 L.Ed.2d 555 (1988).

It is unreasonable to expect that a council member denied absolute legislative immunity and facing a potential damages judgment assessed against him or her personally would have the courage, much less the objectivity, to ignore explicit threats of future suits when engaging in the discretionary decision

making necessary to approving payment of a punitive damages judgment pursuant to ***Cal.Gov. Code §825(b). Tenney v. Brandhove, supra at*** 341 U.S. 377, 95 L.Ed.2d 1027. That the decision to deny legislative immunity for this activity is ill advised is most clearly seen in the fact that it is not the individual public employee whose punitive damages judgment is not paid who is the big loser as a result, but instead the taxpayers who lose the lawmaker's objective and neutral assessment of whether payment of the judgment would have been in the best interests of the public entity.

Certiorari should be granted in order to extend absolute legislative immunity to protect local city council members from personal liability for decisions to pay the punitive damages portion of civil judgments. As long as the lawmaker is engaged in discretionary decision making and has the power to make official policy on behalf of the public entity through such decisions, the fact that each decision does not have a broad and general application should not be deemed dispositive. This is an important question of federal law which should be decided by this court and certiorari is therefore appropriate.

IV.
CONCLUSION

For the foregoing reasons it is respectfully requested that this Court grant a writ of certiorari and set aside the decision of the United States Court of Appeals for the Ninth Circuit.

DATED: July 15, 1994

Respectfully submitted,

JAMES K. HAHN, City Attorney
THOMAS C. HOKINSON, Sr.
Asst. City Attorney
KATHERINE J. HAMILTON,
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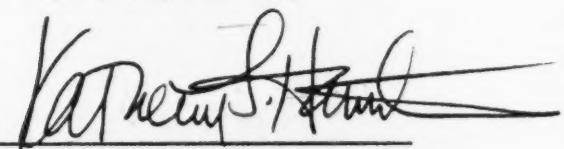

By _____
KATHERINE J. HAMILTON,
Deputy City Attorney

Attorneys for Petitioners

APPENDIX A

OPINION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN *TREVINO v. GATES*, 23 F.3d 1480, Filed May 31, 1994

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHANNA TREVINO, a Minor, by and through her next friend, her Grandmother, Filadelphia Cruz,
Plaintiff-Appellee,

v.

DARYL GATES,
Defendant,

and

JOEL WACHS, JOY PICUS, JOHN FERRARO, ZEV YAROSLAVSKY, RUTH GALANTER, ERNANI BERNARDI, MARVIN BRAUDE, HAL BERNSON, MICHAEL WOO, JOAN FLORES,
Defendants-Appellants.

No. 92-56069

D.C. No. CV-92-1981-JSL

ORDER AND OPINION

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Argued and Submitted
February 1, 1994—Pasadena, California

Opinion filed February 18, 1994
Opinion withdrawn May 31, 1994

Filed May 31, 1994

Before: Joseph T. Sneed, David R. Thompson and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Thompson

SUMMARY

Government Law/Immunity/Individual Rights

The court of appeals affirmed a district court order. The court held that city council members who, pursuant to California Government Code § 825(b), voted to have the city pay a punitive damage award imposed against city police officers, performed an administrative act, for which they were not entitled to absolute immunity.

After a robbery, appellee Johanna Trevino's father and others involved in the robbery were shot and killed by Los Angeles police officers. After a lawsuit, a jury imposed punitive damages against the officers who participated in the killings. After the judgment was entered, appellants, members of the Los Angeles City Council, voted to have the City pay the punitive damage award.

Trevino sued the council members, alleging that they violated her civil rights by encouraging the police to routinely use excessive force. She alleged that this encouragement contributed to her father's death.

The council members moved to dismiss the claims, contending that in considering and voting on whether to authorize the City to pay the award, they acted in a legislative capacity pursuant to California Government Code § 825(b), which provides that in certain circumstances, a public entity may pay punitive damages awards imposed against an employee. The council members further contended that they were entitled to absolute legislative immunity. The district court rejected the immunity claim, and denied the motion to dismiss. The council members appealed.

[1] Determinations made by city council members whether to pay punitive damage awards pursuant to section 825(b) are of limited application and are non-legislative in nature. The

decisions are made on a case-by-case basis. Based on the record in this case, it could not be said that the decisions involved the formulation of policy. Nor did they apply to the community at large. [2] The particularized, case-by-case findings required under section 825(b) compel the conclusion that decisions to pay punitive damages under the section are individually, not generally, directed, involve no broad policy considerations, and thus fall outside those types of legislative actions receiving the cloak of absolute immunity.

COUNSEL

Annette Keller, Assistant City Attorney, Los Angeles, California, for the defendants-appellants.

Stephen Yagman, Yagman & Yagman, Venice, California, for the plaintiff-appellee.

ORDER

The opinion filed February 28, 1994, and published at 17 F.3d 1189 (9th Cir. 1994), is withdrawn. That opinion is replaced by the opinion filed contemporaneously with this order.

OPINION

THOMPSON, Circuit Judge:

The plaintiff sued the Los Angeles Chief of Police and members of the Los Angeles City Council in their individual capacities under 42 U.S.C. § 1983. She alleged the council members violated her civil rights by encouraging the police to

routinely use excessive force. This encouragement, she alleged, contributed to the death of her father.

The council members moved to dismiss the plaintiff's claims. They contended that in considering and voting on whether to authorize the city to pay punitive damage awards they acted in a legislative capacity pursuant to California Government Code § 825(b),[1] and they were entitled to absolute legislative immunity. The district court rejected their immunity claim and denied their motion to dismiss. *Trevino v. Gates*, 798 F. Supp. 621 (C.D. Cal. 1992). They appeal.

We have jurisdiction, because the denial of a motion to dismiss based upon a claim of absolute immunity is an immediately appealable interlocutory order. *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 499 (1989); *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985); *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992). We affirm. We hold that city council members who vote to pay a punitive damage award pursuant to California Government Code § 825(b) perform an administrative, not a legislative, act; therefore, they are not entitled to absolute immunity.

---

[1]California Government Code § 825(b) provides in pertinent part:

> [A] public entity . . . is authorized to pay that part of a judgment that is for punitive or exemplary damages if the governing body of that public entity, acting in its sole discretion, finds all of the following:
>
> (1) The judgment is based on act or omission of an employee or former employee acting within the course and scope of his or her employment . . . .
>
> (2) . . . [T]he employee . . . acted . . . in good faith, without actual malice, and in the apparent best interests of the public entity.
>
> (3) Payment of the claim or judgment would be in the best interests of the public entity.

FACTS

The plaintiff, Johanna Trevino, is 2 1/2 years old. Her father was shot and killed by Los Angeles police officers who waited outside a McDonald's restaurant and watched as her father and three other men robbed the place. When the men left the restaurant and got into their getaway car, the police used their police vehicles to block the car's movement. Then the police opened fire. They fired approximately 20 shotgun rounds into the robbers' car. The plaintiff's father was not immediately killed, but he was near fatally wounded. One of the officers then shot him in the top of the head from a distance of two feet. In all, three of the robbers were killed, including the plaintiff's father. One of the robbers survived.[2]

In a lawsuit filed by the surviving robber, and the survivors of those who were killed, a jury awarded no compensatory damages, but awarded the plaintiffs punitive damages aggregating $44,000. These damages were imposed against the officers who participated in the killings.

After the judgment was entered, the council members voted to have the city pay the punitive damage award. The plaintiff then filed this lawsuit. She alleged the defendants encouraged and condoned the policy of constitutional violations that led to her father's death.

The council members did not challenge the merits of the plaintiff's complaint. They moved to dismiss the complaint solely on the ground that they were entitled to absolute legislative immunity.

---

[2]A more detailed statement of the facts is set forth in *Gomez v. Gates*, 804 F. Supp. 69, 71 (C.D. Cal. 1992). The facts recited above are taken from the statement of facts which the district court, in *Gomez*, stated the jury could have found in returning their verdict in favor of the plaintiffs.

STANDARD OF REVIEW

We review a district court's determination regarding immunity de novo. *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1107 n.6 (9th Cir. 1987); *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1046 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989); *Capoeman v. Reed*, 754 F.2d 1512, 1513 (9th Cir. 1985).

DISCUSSION

"The absolute immunity of legislators, in their legislative functions, . . . now is well settled." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (citations omitted). *See also Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349 (9th Cir. 1982). "Absolute immunity protects the legislative process by shielding lawmakers from civil liability based on their legislative role which necessarily involves the balancing of social needs and rights of different groups." *Gutierrez*, 838 F.2d at 1046. *See also Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). This absolute immunity extends to local legislators. *Kuzinich*, 689 F.2d at 1349.

However, while "members of local legislative bodies have complete immunity from suits based on their legislative acts," *id.*, "not all governmental acts by a local legislator, or even a local legislature, are necessarily legislative in nature." *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 580 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985). Acts that are administrative or executive in nature receive less than absolute protection. *Bateson v. Geisse*, 857 F.2d 1300, 1304 (9th Cir. 1988); *Cinevision*, 745 F.2d at 577. The burden of proof in establishing absolute immunity is on the individual asserting it. "[O]fficials seeking absolute immunity must show that such immunity is justified for the governmental function at issue." *Hafer v. Melo*, 112 S. Ct. 358, 363 (1991) (citing *Burns v. Reed*, 111 S. Ct. 1934 (1991)).

In making the determination whether an act is legislative in nature, some courts distinguish between whether the act involves the formulation of policy, or is the type of "ad hoc decisionmaking engaged in by an executive." *Cinevision*, 745 F.2d at 580. *See also Zamsky v. Hansell*, 933 F.2d 677, 679 (9th Cir. 1991) (monitoring compliance with established laws or regulations and offering recommendations on how compliance could be achieved was executive, not legislative, function). Other courts differentiate between executive and legislative acts by examining the scope of the act in question: "[A]n act which applies generally to the community is a legislative one, while an act directed at one or a few individuals is an executive one." *Bateson*, 857 F.2d at 1304 (quoting *Cinevision*, 745 F.2d at 579). *See also Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984).

[1] Applying these considerations, we conclude determinations made by city council members whether to pay punitive damage awards pursuant to section 825(b) are of limited application and are non-legislative in nature. These decisions are made on a case-by-case basis. Based on the record before us, we cannot say they involve the formulation of policy. Nor do they apply to the community at large. Rather, they are directed toward shielding individuals from specific damage awards. *See Bateson*, 857 F.2d at 1304 (city council members enjoy no absolute immunity for determinations on building permits, because building permits do not apply to the general community or involve the promulgation of legislative policy, but are directed at individuals); *Cinevision*, 745 F.2d at 580 (council members' votes to disapprove concerts provided for by contract are administrative in nature); *Kuzinich*, 689 F.2d at 1350 (an order to institute an action to abate a private business is executive, not legislative).

The council members argue their deliberations and decisions under section 825(b) are legislative in nature because the statute is a grant of authority by the state legislature to determine and act on the needs and interests of the community

as a whole in connection with civil judgments that implicate the constitutional rights of judgment creditors. *See Cornwell v. City of Riverside*, 896 F.2d 398, 400 (9th Cir. 1990).

We reject this argument. It fails to address the nature of the specific decisions made by council members pursuant to section 825(b). Although council members must consider whether payment of a judgment "would be in the best interests of the public entity," Cal. Gov't Code § 825(b)(3), this does not mean decisions made pursuant to this section are general policy decrees.

[2] Every decision by a local legislature can be described as one made in the best interests of the public. Moreover, as we stated in *Cinevision*, 745 F.2d at 580, "[a]lthough a local legislator may vote on an issue, that alone does not necessarily determine that he or she was acting in a legislative capacity." *See also Hafer*, 112 S. Ct. at 363. The particularized, case-by-case findings required under section 825(b) compel us to conclude that decisions to pay punitive damages under that section are individually, not generally, directed, involve no broad policy considerations, and thus fall outside those types of legislative actions receiving the cloak of absolute immunity. We therefore affirm the district court's denial of the defendants' motion to dismiss on the ground of absolute immunity.

AFFIRMED.[3]

[3]We do not address the question whether the council members may be entitled to qualified immunity. Nor do we consider whether the plaintiff's claims are sufficient to survive a motion to dismiss on some other ground, or whether her claims would survive a motion for summary judgment.

APPENDIX B

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA IN *TREVINO v. GATES,* 798 F.Supp. 621 (C.D. Cal. 1992)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHANNA TREVINO,	)	**CV 93-1981 JSL**
	)	
Plaintiff,	)	**ORDER DENYING**
	)	**MOTION TO**
v.	)	**DISMISS CERTAIN**
	)	**DEFENDANTS**
DARYL GATES, et al.,	)	**BASED ON**
	)	**LEGISLATIVE**
	)	**IMMUNITY**

Filed August 7, 1992
Entered August 10, 1992

The question presented for decision is whether defendant members of the Los Angeles City Council have absolute immunity from being sued for indemnifying police officers found by a jury to have used excessive force in violation of the Constitutional rights of the victim citizens.

If the defendants prevail, it means that there are no circumstances, no matter how egregious, under which the defendants could be brought to

personal account for the consequences of their behavior. At this stage of the proceedings, the court has no reason to doubt that any council member has acted in complete good faith with respect to indemnification decisions, and indeed the court would be shocked if plaintiff were to discover any serious improprieties.

It must be remembered, however, that if the council members are entitled to absolute legislative immunity, the court's beliefs in this regard will not be tested, in this case or in any other. The worst behavior which might be imagined, such as that the council members actually agreed to ignore the authorizing statute entirely and to vote to indemnify in every case, or that they made indemnification decisions based on the race of the victims, or even that they routinely accepted bribes in return for indemnification, would not expose the council members to personal liability.

The indemnity decisions in question were made pursuant to a California statute which reads as follows:

> [A] public entity...is authorized to pay that part of a judgment that is for punitive or exemplary damages if the governing body of that public entity, acting in its sole discretion,

finds all of the following:

(1) The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment....

(2) ...[T]he employee...acted...in good faith, without actual malice and in the apparent best interests of the public entity.

(3) Payment of the claim or judgment would be in the best interests of the public entity.

Cal. Gov't Code § 825(b) (West Supp. 1992).

Plaintiffs allege that the City Council has not followed the dictates of the statute, but instead has followed a pattern and practice of indemnifying the officers in substantially every case without regard to the stated statutory considerations. Plaintiffs allege that, by acting in this manner, the City Council has encouraged and ratified the use of excessive force by the police, and that this encouragement and ratification were proximate causes of plaintiff's injuries in this case.

The merits of this contention, and whether it states a cause of action at all, are not before the court. The defendants seek to avoid having to address these and all other issues which might arise, if the case were to go forward, on the grounds that

the council members have absolute legislative immunity with respect to the matters in question.

The Supreme Court has explained the rationale for absolute legislative immunity:

> Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

Tenney v. Brandhove, 341 U.S. 367, 377, 71 S.Ct. 783, 788 (1951). For excellent reasons, the rule of absolute immunity of legislators protects them from being sued at all. It is not, like qualified immunity, a defense entitling legislators to immunity only for acts taken "in good faith." See discussion infra.

Although a good and necessary rule, however, the rule that legislators have absolute immunity for their acts is not without drawbacks. Its consequence is that while cloaked with immunity, a legislator can deliberately and willfully inflict grievous

injury on anyone, without any color of law, and he cannot be sued. Naturally, therefore, the mere fact that a person happens to be a legislator does not render him absolutely immune from suit for any of his acts. Legislators still must pay their bills, and comply with the speed laws. They are no more free than anyone else to assault people on the street.

The cloak of absolutely legislative immunity covers them, however, when they act in their legislative capacity. Defendants' contention that the acts of which the plaintiff complains in this case were legislative centers upon the fact that they were accomplished by vote. Defendants cite several cases in which legislators were held entitled to legislative immunity with respect to their votes, e.g., Kuzinich v. County of Santa Clara, 689 F.2d 1345 (9th Cir. 1982); Brown v. Crawford County, Ga., 960 F.2d 1002 (11th Cir. 1992). In the cases cited, however, the matter being voted upon was found to be legislative in character. They do not say that if legislators undertake a non-legislative function, as to which they act by vote, they are entitled to absolute

legislative immunity.[1]

The Ninth Circuit has formulated the issue in the following way:

> Although a local legislator may vote on an issue, that alone does not necessarily determine that he or she was acting in a legislative capacity. Rather, '[w]hether actions...are, in law and fact, an exercise of legislative power depends not on their form but upon "whether they contain matter which is properly to be regarded as legislative in its character and effect."' INS v. Chadha, 462

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[1] Defendants also suggest that they are entitled to "absolute quasi-judicial immunity" based upon Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894 (1978). Butz, however, stands only for the proposition that the judicial functions to which absolute judicial immunity attaches are not limited to proceedings conducted by the judiciary. Such immunity can attach, it holds, to any function which is judicial in nature regardless of which branch of government performs it. The court does not see any of the attributes of a judicial function in the acts of the Council at issue in this case. The statute does not appear to contemplate that findings to be made thereunder are to be made by any judicial or quasi-judicial hearing or other process, and defendants have not suggested that any such process was involved.

U.S. 919, 952, 103 S.Ct. 2764, 2784, 77 L.Ed.2d 317 (1983) (discussing Congressional action) (citation omitted). "The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct." Yakus v. United States, 321 U.S. 414, 424, 64 S.Ct. 660, 667, 88 L.Ed. (1944) (citation omitted).

Cinevision Corp. v. City of Burbank, 745 F.2d 560, 580 (9th Cir. 1984). The Court of Appeals, applying this test, held that a council member's votes to disapprove concerts provided for by a contract were mere "[a]dministration of a municipal contract," and thus not legislative acts entitling him to immunity. Id.

The more the particular acts of legislators are directed toward the consideration and adoption of legislation of general application ,the more clearly the acts are legislative in character. Conversely, the more the particular act, albeit done by vote of the legislature, is directed solely to private interests, the more likely the act will be construed to be non-legislative in character. See Hughes v. Tarrant

County, Tex., 948 F.2d 918 (5th Cir. 1991).[2] This distinction appears consistent with the policies behind immunity. When legislators deal with legislation which will affect the public at large, there is maximum interest in freeing them from the threat of lawsuits brought by interested private parties who may be harmed by legislation passed for the general good. When legislators address matters of very limited application, (so that the persons who sue them are unlikely to be persons whose interests are at odds with those of the public as a whole), it is less defensible to shield the legislators from liability when their acts are in bad faith or otherwise in contravention of clearly established law.

The policy of not permitting the threat of lawsuits to interfere with legislative decision-making is an important one. The implementation of that policy, however, through a rule of law giving complete license for bad faith acts having no relation to legitimate legislative objectives could produce very

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[2] The court is mindful that the Ninth Circuit has found this issue not to be the beginning and the end of the analysis. Cinevision, 745 F.2d at 579. The same case did observe that the distinction "may at times be useful," id., and the court finds it to be so in this case.

dubious results. If it were true that the City Council has granted unthinking indemnity to all police officers who have used excessive force on victim citizens, no matter how wilfully the force was applied, it would seem quite likely that this practice has contributed significantly to the problems which were revealed in the Report of the Independent commission on the Los Angeles Police Department, among other places. As long as those responsible for the use of excessive force are able to pass the economic consequences of their acts to taxpayers, change is likely to remain difficult.

Applying these considerations along with the cases already discussed, the court concludes that the acts of which plaintiff complains in this case are not legislative in character, and do not give rise to absolute legislative immunity.

The court does not address here the question of whether the city council members may be entitled to qualified immunity. It would be premature to consider it, because it cannot be decided on the basis of the pleadings alone. The court has considered, however, the ramifications of its holding that the council members are not entitled to absolute immunity, and its conclusion as to that question is influenced by an understanding of the place which

qualified immunity has in the decisional scheme.

The court assumes, without deciding, that the relevant standard for deciding whether the council members are entitled to qualified immunity is that set forth in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982). Under Harlow, the council members would be entitled to qualified immunity for acts in the course of their duties "insofar as their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818, 102 S.Ct. at 2738. Under this standard, as indicated above, facts could conceivably exist under which the council members would not be entitled to qualified immunity. The standard makes it appear unlikely, however, that the case against these defendants will proceed all the way to trial.

The court has also considered the contention that if there is no absolute immunity, council members theoretically could be sued every time they case a vote on an indemnity matter. The court regards this as a red herring. The indemnity vote does not take place until after the jury has

determined liability on the part of the officers.[3] It is a rare plaintiff who would complain about a vote to indemnify which would have the effect of assuring full and prompt payment. Similarly, it seems, since the statute is permissive in nature, a lawsuit brought by a disappointed officer who was denied indemnity would receive very short shrift from the courts.

It is true, of course, that denying absolute immunity could have the effect of adding council members to the list of individual defendants who are habitually joined by some counsel who specialize in excessive force cases, but who never actually pay the judgments.[4] Such defendants, however, are routinely dismissed early in these cases, on the basis

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[3] Plaintiff Trevino is unique in this regard. As the unborn child of a victim of the very act of which Trevino now complains, the liability of the acting officers has already been established. To some extent, Trevino may now be understood to allege that the act of the City Council to indemnify the officers amounted to a ratification of the officers' unconstitutional conduct. The court here does not intend here to comment in any way on the validity of such a theory, or on the application of qualified immunity to this theory.

[4] This list currently includes the mayor, the police commission members, and the police chief.

of qualified immunity. If this continues to be true, the practice of joining council members would probably be short-lived. If, on the other hand, it developed that council members were not entitled to routine dismissal on the basis of qualified immunity, it seems certain that the facts would be such as to make it appropriate that they be held responsible for their acts.

Defendants motion to dismiss defendant council members on the grounds of absolute legislative immunity is DENIED.

IT IS SO ORDERED.

DATED: 8-7-92

J. Spencer Letts
United States District Judge